POSC TI Sdn Bhd v Kerajaan Negeri Terengganu & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22C-29–07 OF 2015
MARY LIM J
26 NOVEMBER 2015

Civil Procedure — Transfer of proceedings — From one High Court to another — Application for transfer of proceedings from High Court at Kuala Lumpur to High Court at Kuala Terengganu — Cause of action for breach of agreement — All matters related to cause of action taking place and situated in Terengganu — Defendants from Terengganu — Defendant's witnesses located in Terengganu — Factors to be taken into account in exercising court's discretion to transfer proceedings — Determining forum convenience — Rules of Court 2012 O 57 r 1

The plaintiff sued the first defendant, the Government of the State of Terengganu and the second defendant, the Land Administrator of Besut over an uncompleted project called 'Taman Ilmu'. The first defendant had appointed the plaintiff as the principal contractor to complete that project. Owing to certain disputes, the first defendant terminated the agreement with the plaintiff and required the plaintiff to vacate the site of the project. The plaintiff claimed that the termination was wrongful and commenced the present suit seeking a declaratory order to that effect. The defendants counterclaimed against the plaintiff. The plaintiff also claimed specific performance of the agreement and damages. The defendants applied vide encl 19 under O 57 r 1 of the Rules of Court 2012 ('the ROC') to transfer the proceedings to the High Court at Kuala Terengganu.

Held, allowing encl 19 with costs in the cause:

(1) The plaintiff's cause of action was for breach of agreement; and that would include the counterclaim; and for remedies ensuing from that breach. Everything that was related to that cause of action, from when the agreement was signed, acted upon, breached; either took place in the State of Terengganu or, existed in that state. The defendants were of that state. The project was developed on land located well inside that state. The witnesses who would testify for the defendants were all from the State of Terengganu. Hence, this case was eminently suitable for the exercise of discretion under O 57 of the ROC to order a transfer of the proceedings (see paras 13 & 17).

(2) The exercise of the discretionary power under O 57 must take into consideration the factors set out in O 57 r 4(A)–(E). These factors are the same factors found in s 23 of the Courts of Judicature Act 1964. It is

evident from a proper reading of O 57 r 4, not any one factor will prevail over the other. The court is to weigh any or all the factors relied on in making a decision on whether the application ought to be acceded to (see paras 18–19).

(3) While the plaintiff may have received the letter of termination at its office in Kuala Lumpur to complete that chain of material elements necessary to found an actionable cause for breach of contract, the material and relevant events all undeniably emanated from the State of Terengganu. The counterclaim related to matters arising in that state. The factors in O 57 r 4(B) and (C) were satisfactorily met (see para 20).

(4) The question of convenience requires the court to balance the two competing contestations of convenience, that by the plaintiff and the other by the defendants. The preponderance of facts clearly leaned in having the case heard at the High Court located at Kuala Terengganu (see paras 22–23).

(5) On the matter of witnesses, it is not the convenience of the plaintiff's witnesses but that of the defendants' that will prevail and that the court will take into regard (see para 24).

(6) It was in the interests of justice that the case be transferred to and heard by the High Court sitting at Kuala Terengganu. The court could see savings of time and costs if the case was heard there. The court could not see any hardship or prejudice occasioned to the plaintiff by such order of transfer (see para 26).

[Bahasa Malaysia summary

Plaintif telah menyaman defendan pertama, Kerajaan Negeri Terengganu dan defendan kedua, Pentadbir Tanah Besut berhubung projek terbengkalai yang dipanggil 'Taman Ilmu'. Defendan pertama telah melantik plaintif sebagai kontraktor utama untuk menyiapkan projek tersebut. Berdasarkan pertikaian tertentu, defendan pertama telah menamatkan perjanjian tersebut dengan plaintif dan menghendaki plaintif mengosongkan tapak projek tersebut. Plaintif telah mendakwa bahawa pemecatan itu adalah salah dan telah memulakan guaman ini dengan memohon perintah deklarasi bagi maksud itu. Defendan-defendan menuntut balas terhadap plaintif. Plaintif juga menuntut pelaksanaan spesifik untuk perjanjian dan ganti rugi. Defendan-defendan telah memohon melalui lampiran 19 di bawah A 57 k 1 Kaedah-Kaedah Mahkamah 2012 ('KM') untuk memindahkan prosiding itu kepada Mahkamah Tinggi di Kuala Terengganu.

Diputuskan, membenarkan lampiran 19 dengan kos dalam kausa:

(1) Kausa tindakan plaintif adalah untuk pelanggaran perjanjian; dan itu termasuk tuntutan balas; dan untuk remedi-remedi yang yang timbul

daripada pelanggaran tersebut. Semua yang berkaitan kausa tindakan itu, dari apabila perjanjian itu telah ditandatangani, dilaksanakan, dilanggari; telah berlaku di negeri Terengganu atau, yang terdapat dalam negeri tersebut. Defendan-defendan adalah dalam negeri itu. Projek tersebut telah dimajukan atas tanah yang terletak dalam negeri tersebut. Saksi-saksi yang memberi keterangan untuk defendan-defendan kesemuanya dari negeri Terengganu. Justeru, kes ini nyata sesuai untuk pelaksanaan budi bicara di bawah A 57 KM untuk memerintahkan pemindahan prosiding (lihat perenggan 13 & 17).

(2) Pelaksanaan kuasa budi bicara di bawah A 57 perlu mempertimbangkan faktor-faktor yang dinyatakan dalam A 57 k 4(A) hingga (E). Faktor-faktor tersebut adalah faktor-faktor yang sama didapati dalam s 23 Akta Mahkamah Kehakiman 1964. Ia jelas berdasarkan pembacaan wajar A 57 k 4, bukan mana-mana satu faktor akan mengatasi yang lain. Mahkamah perlu menimbangkan mana-mana atau semua faktor yang digunakan dalam membuat keputusan tentang sama ada permohonan itu patut dipersetujui (lihat perenggan 18–19).

(3) Di mana plaintif mungkin telah menerima surat penamatan di pejabatnya di Kuala Lumpur untuk melengkapkan rangkaian elemen penting yang perlu untuk mendapati terdapat kausa yang boleh diambil tindakan kerana pelanggaran kontrak, kejadian penting dan relevan kesemuanya tidak dapat dinafikan berpunca dari negeri Terengganu. Tuntutan balas itu adalah berkaitan perkara yang timbul dalam negeri tersebut. Faktor-faktor dalam A 57 k 4(B) dan (C) telah dipenuhi (lihat perenggan 20).

(4) Persoalan kesesuaian memerlukan mahkamah mengimbangi dua persaingan kesesuaian yang bersaing, iaitu oleh plaintif dan yang lain oleh defendan-defendan. Kebanyakan fakta jelas lebih condong kepada menginginkan kes itu didengar di Mahkamah Tinggi yang terletak di Kuala Terengganu (lihat perenggan 22–23).

(5) Berhubung perkara tentang saksi-saksi, ia tidak sesuai untuk saksi-saksi plaintif tetapi untuk defendan-defendan yang akan kekal dan bahawa mahkamah akan mempertimbangkan (lihat perenggan 24).

(6) Ia adalah demi kepentingan keadilan bahawa kes itu dipindahkan ke dan didengar oleh Mahkamah Tinggi yang bersidang di Kuala Terengganu. Mahkamah dapat melihat penjimatan masa dan kos jika kes itu didengar di situ. Mahkamah tidak dapat melihat apa-apa kesukaran atau prejudis yang berlaku kepada plaintif disebabkan oleh perintah pemindahan tersebut (lihat perenggan 26).]

Notes

For cases on transfer of proceedings in general, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 10328–10332.

Cases referred to

American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor [1995] 1 MLJ 160, SC (refd)

Bank Utama (M) Bhd v Perkapalan Dai Zhun Sdn Bhd [2003] 5 MLJ 40; [2003] 1 CLJ 450, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 23
National Land Code Form 5A
Rules of Court 2012 O 57, O 57 rr 1, 4, 4(A), (B), (C), (D), (E)
Rules of the High Court 1980 O 92

Hariharan Thara Singh (Peter Jayasuria, Tinakaran a/l Karuppiah and Ravindran a/l Karivandan with him) (Ali Kamaruddin & Ravi) for the plaintiff.

Shaharaliza bt Ab Razak (Assistant State Legal Advisor, State Legal Advisor's Office Terengganu) for the defendant.

Mary Lim J:

[1] Enclosure 19 is an application by the defendants to transfer the present proceedings to the High Court at Kuala Terengganu. There are two other interelocutory applications; encl 4 which is the plaintiff's application for an interlocutory injunction; and encl 27 which is the plaintiff's application to strike out the defendants' counterclaim.

[2] Enclosure 27 has since been struck out with no order as to costs upon the plaintiff's withdrawal of the application while the parties by consent, agree that the status quo of the substantive issues and matters between the parties as earlier agreed, be preserved pending the disposal of encl 19.

[3] The application in encl 19 is made pursuant to O 57 r 1 of the Rules of Court 2012. The affidavit in support is in encl 20. The plaintiff has filed an affidavit in reply — encl 25 to which the defendants have replied in encl 30 and the plaintiff has filed another affidavit in reply (2) in encl 34. In substance, the defendants say that it would be more convenient for all concerned if the case is transferred to and heard by the High Court sitting in Kuala Terengganu. This is because the cause of action arises in the State of Terengganu, the witnesses and the documents relied on are all in that state and the defendants are from

that state. There is also no prejudice caused to the plaintiff if the order was made.

[4] Upon hearing both parties, this court allowed the defendants' application. These are my reasons.

[5] First, some background facts as gleaned from the pleadings. The plaintiff has sued the first defendant, the Government of the State of Terengganu and the second defendant, the Land Administrator of Besut. What had happened is this; the first defendant had an uncompleted project called 'Taman Ilmu'. That project was started in 2007. By a public private partnership agreement dated 10 May 2012, the first defendant appointed the plaintiff as the principal contractor to complete that project ('the said agreement'). The plaintiff claimed that the first defendant had agreed to amongst others; grant the plaintiff a 66 year lease over the relevant land to enable the plaintiff to obtain the necessary financing for the project. The parties, inter alia, agreed that the plaintiff was only to pay nominal premium for the grant of such land.

[6] Pending the grant of the land, the plaintiff claimed that it had invested RM30m into the project using its alternative sources of funds. The plaintiff claimed that it had made various payments such as payment of deposit to the Lembaga Jurukur Tanah Melayu for land survey works; and the appointment of a turnkey contractor for the project.

[7] The plaintiff narrates from paras 17–27 of the statement of claim, the problems that it encountered over the payment of premium before the grant of the lease could be issued to the plaintiff. The plaintiff claimed that it never received the Form 5A issued under the National Land Code ('the NLC') by the second defendant for the payment of such premium. This first Form 5A was issued sometime in August 2012. By the time the plaintiff learnt of the issuance of this Form 5A, the time had for payment of the premium had already lapsed. So, the matter was referred back to the first defendant who, on 8 January 2014, approved the issuance of a new Form 5A.

[8] The second defendant served this new Form 5A on the plaintiff vide letter dated 5 May 2014. The plaintiff made payment vide letter dated 26 May 2014 and the receipt of such payment was acknowledged on 12 June 2014.

[9] However, on 22 June 2014, the second defendant returned the plaintiff's payments on the basis that it been directed by the first defendant to withhold receipt of the payment of the premium. The plaintiff appealed to both defendants against that decision. There were no replies from either defendant.

[10] The plaintiff then instructed its solicitors to claim specific performance

on the payment of the premium from the first defendant. Again, that failed to elicit any response from the first defendant. By letter dated 9 October 2014, the first defendant informed the plaintiff to proceed with the project as agreed. By letters dated 16 January 2015 and 26 January 2015, the second defendant informed the plaintiff that the time for payment of the premium had been extended to three months from the date of receipt of the letters. On 3 February 2015, a new Form 5A was issued to the plaintiff. On 28 April 2015, the plaintiff made payment through two cheques sent to the second defendant. Till date, those two cheques are still with the second defendant. The grant of title has yet to be issued.

[11] On 1 July 2015, the plaintiff learnt that its agreement with the first defendant had been terminated on 30 June 2015. That letter of termination required the plaintiff to vacate the site of the project upon such termination. The plaintiff claimed that the termination is wrong or unlawful, invalid, mala fides and without basis. In this suit against the two defendants, the plaintiff is seeking a declaratory order that the termination is wrongful, invalid and ineffective; specific performance of the agreement; and various types of damages including specific and general damages. The plaintiff is also seeking an order injuncting the appointment of any other third party to complete or take over the project pending the disposal of this claim.

[12] In defence, the defendants in essence say that the delay in the issuance of the grant of the lease is due to the plaintiff's own delay in payment of the premium within the requisite time. As for the termination of the said agreement, the defendants say that it is by reason of the plaintiff's own failure to meet its obligations under the terms of the said agreement that the defendants exercised its right of termination under cl 7.1(ii) of the said agreement. The defendants have counterclaimed for various losses claimed to have been sustained as a result of the plaintiff's delay in paying the premium; as well as costs for completion of the project. The plaintiff has substantially denied the counterclaim.

[13] It is quite clear from the above narration of the pleaded case that the plaintiff's cause of action is for breach of the said agreement; and that would include the counterclaim; and for remedies ensuing from that breach. Everything that is related to that cause of action, from when the said agreement was signed, acted upon, breached; either took place in the State of Terengganu or, exists in that state. The defendants are of that State, no less the Government of the State of Terengganu and the second defendant is a Land Administrator of the district of Besut, located in the State of Terengganu. The project, Taman Ilmu is developed on land (Bukit Keluang/Dendang, Mukim Tembila, Besut) located well inside that state. The witnesses who will testify for the defendants,

especially the persons dealing with Form 5A are all from the State of Terengganu.

[14] The defendants say that it would be more convenient in such circumstances that the case be transferred to and heard at the High Court sitting in Terengganu. The defendants added that there will be no prejudiced caused to the plaintiff by such an order of transfer.

[15] The plaintiff disagrees. The plaintiff opposes the application and its counsel submits that the factors all point to the High Court at Kuala Lumpur being the proper forum to hear the matter.

[16] First, the plaintiff claims that it received the letter of termination at its office located in Kuala Lumpur. Learned counsel for the plaintiff added that since the facts in dispute relate to that letter of termination, the cause of action arises in Kuala Lumpur. As for the matter of witnesses and documents, the plaintiff claims that the witnesses called by both sides will really be called only to identify documents. In any case, its witnesses (potentially, five of them) are all from around the Klang Valley. The plaintiff further submitted that the claim fell within the jurisdiction of the construction court which sits in Kuala Lumpur, or Shah Alam. Hence, the conditions under O 57 rr 1 and 4 have not been met.

[17] With respect, the court disagrees with the plaintiff. Given the conditions as described by the defendants and which cannot be denied, I agree with the defendants that this case is eminently suitable for the exercise of discretion under O 57 of the Rules of Court 2012 to order a transfer of the proceedings. The relevant provisions of O 57 read as follow:

> Transfer of proceedings to another Court (O 57 r 1)
>
> (1) Where the Judge of the High Court or a Judge of the Sessions Court or a Magistrate is satisfied that any proceedings in that Court can be more conveniently or fairly tried in some other Court of co-ordinate jurisdiction, he may on application by any party, order the proceedings to be transferred to the other Court.
>
> (2) A transfer of any proceedings from —
>
> (a) a Subordinate Court to the High Court; or
>
> (b) the High Court to a Subordinate Court,
>
> shall only be made by an order of that High Court Judge on application by any party by originating summons or notice of application, whichever is appropriate.
>
> (3) A transfer of any proceedings from —
>
> (a) a Magistrates' Court to a Sessions Court; or
>
> (b) a Sessions Court to a Magistrates' Court,

shall only be made by an order of that Sessions Court Judge on application by any party by originating summons or notice of application, whichever is appropriate.

(4) Before making any order to transfer any proceedings from —

(a) the High Court to another High Court of co-ordinate jurisdiction;

(b) a Subordinate Court to the High Court;

(c) the High Court to a Subordinate Court; or

(d) a Subordinate Court to another Subordinate Court,

the High Court Judge or the Judge of the Sessions Court or Magistrate, as the case may be, shall take into consideration whether the High Court or Subordinate Court which shall hear the case is located at or nearest to the place where —

(A) the cause of action arose;

(B) the defendant, or one of the several defendants, resides or has his place of business;

(C) the facts on which the proceedings are based exist or are alleged to have occurred;

(D) the land the ownership of which is disputed is situated; or

(E) for other reasons it is desirable in the interests of justice that the proceedings should be transferred.

[18] First of all, there is power to make such an order under O 57. The exercise of this discretionary power must take into consideration the factors set out in O 57 r 4(A) to (E). These factors are the same factors found in s 23 of the Courts of Judicature Act 1964 ('Act 91').

[19] It is also evident from a proper reading of O 57 r 4, not any one factor will prevail over the other. The court is to weigh any or all the factors relied on in making a decision on whether the application ought to be acceded to.

[20] From the material pleas in the plaintiff's statement of claim, it is clear that the facts in issue and the allegations of unlawful termination either occurred in the State of Terengganu and/or involve the defendants who are obviously from that state. While the plaintiff may have received the letter of termination at its office in Kuala Lumpur to complete that chain of material elements necessary to found an actionable cause for breach of contract, the material and relevant events all undeniably emanate from the State of Terengganu. Certainly, the counterclaim of the defendants relates to matters which arise in that state.

[21] It is also the firm belief of this court that the factors in O 57 r 4(B) and (C) are satisfactorily met. The defendants certainly reside in the State of

Terengganu, the facts on which the whole proceedings are based exist or are alleged to have occurred all took place within the territory of the State of Terengganu. While the ownership of the land is not in dispute, the project which is the subject matter of the said agreement is located in that state.

[22] The High Court sitting at Kuala Terengganu is indeed the more appropriate, suitable and more convenient court to hear this case. The question of convenience requires the court to balance the two competing contestations of convenience, that by the plaintiff and the other by the defendants — see *Bank Utama (M) Bhd v Perkapalan Dai Zhun Sdn Bhd* [2003] 5 MLJ 40; [2003] 1 CLJ 450. Although that was a case of an application to transfer proceedings from the High Court of Malaya sitting at Kuala Lumpur to the High Court of Sabah and Sarawak sitting at Kuching and invoking the court's inherent jurisdiction under O 92 of the Rules of the High Court 1980 read with s 23 of the Courts of Judicature Act 1964, as there was no O 57; the principles are relevant and insightful. See also *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160 on discussions on the principle of forum conveniens.

[23] It is obvious from the presented facts as seen from the plaintiff's own writ of summons and statement of claim that the preponderance of facts clearly lean in having the case heard at the High Court located at Kuala Terengganu.

[24] On the matter of witnesses, it is not the convenience of the plaintiff's witnesses but that of the defendants' that will prevail and that the court will take into regard. I agree looking at what has been presented before the court, not only the witnesses but the documents which have anything to do with the claim and the counterclaim all took place in the State of Terengganu.

[25] Furthermore, the claim is not about the termination of the said agreement simpliciter, but about the various obligations of the parties under the said agreement. Most important, it is about the project to build a Taman Ilmu in Besut, Terengganu; not in Kuala Lumpur or anywhere in its territory.

[26] Under these conditions and circumstances, it is the court's view that these are good reasons for acceding to the application. It is, furthermore, in the interests of justice that the case be transferred to and heard by the High Court sitting at Kuala Terengganu. I can certainly see savings of time and costs if the case was heard there. I certainly, cannot see any hardship or prejudice occasioned to the plaintiff by such order of transfer.

[27] The application in encl 19 is accordingly allowed with costs in the cause. The deputy registrar of the High Court is directed to have all the related

documents sent immediately to the registry at the High Court sitting in Kuala Terengganu.

Enclosure 19 allowed with costs in the cause.

Reported by Kanesh Sundrum